No. 86-1638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, A Delaware Corporation and DONALD SCHWENNESEN,

Petitioners,

v.

WARREN E. SIBLE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Montana

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PETITIONERS' REPLY BRIEF

P. CAMERON DEVORE *
MARSHALL J. NELSON
DONALD S. KUNZE
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

HAROLD V. DYE
MILODRAGOVICH, DALE & DYE, P.C.
P.O. Drawer R
Missoula, Montana 59806
(406) 728-1455

Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' REPLY BRIEF

INTRODUCTION

This brief is necessary to counter three arguments raised in the respondent Sible's brief in opposition: (1) his factual argument concerning the record; (2) his argument that the Montana Supreme Court's decision *is* consistent with *St. Amant v. Thompson*, 390 U.S. 727 (1968); and (3) his argument that the Petition is premature because the reporter's notes have not yet been examined.

STATEMENT OF THE CASE

Sible's factual arguments depend almost exclusively on two mischaracterizations: (1) that the reporter Schwennesen "purposefully" decided not to contact John Christian, even though he was "warned" and "implored" to do so by both his source and Sible; and (2) that both Schwennesen and his editor essentially admitted publication with actual malice. Neither argument can survive examination of the record.

Sible ignores the fact the Schwennesen twice tried to contact Christian and found that he was on vacation. Tr. at 1850-51. Later, Schwennesen determined that it was unnecessary to contact Christian after Sible affirmed he had the smoker in his possession and after the sheriff and Eckerson had confirmed other elements of Salisbury's story. Tr. at 672-73, 1872, 1873.

Sible also exaggerates how much he stressed that Schwennesen should contact Christian at the time Schwennesen was conducting his investigation. When at one point Schwennesen asked Sible who he would recommend Schwennesen talk to, Sible said: "I think Johnny Christian . . . . But, John may not tell you anything." Tr. at 596. Even at trial Sible admitted he did not know what information Christian would have provided. Tr. at 1407, 1408. Sible also recommended that Schwennesen contact the sheriff, Tr. at 598, 600, which Schwennesen did do several times. In fact, the record reveals that Schwennesen had multiple corroborating bases for his article.

SUMMARY OF ARGUMENT

Sible's brief is founded on three primary errors. First, Sible attempts to capitalize on the Montana Supreme Court's error in viewing the facts in the light most favorable to Sible.[1] A balanced review of the trial record,

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[1] Sible cites *Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), for the proposition that the

however, reveals no actual malice. That was the determination of a properly instructed jury. That also was the determination of the one Montana Supreme Court Justice who refused to view the record from an intentionally one-sided perspective. *See* Concurrence of Justice Hunt in Appendix to Petition at 9a-11a. Sible's brief compounds the Montana Supreme Court majority's admittedly distorted presentation of the facts by further misconstruing testimony and taking statements out of context.

Second, Sible attempts to reconcile the Montana Supreme Court's opinion with this Court's definition of actual malice in *St. Amant v. Thompson.* It is impossible, however, to evade the fact that the Montana Supreme Court rejected jury instructions taken nearly verbatim from *St. Amant* while not even acknowledging the existence of the case.

Third, Sible makes the unsupported and erroneous assertion that because Schwennesen's notes were not part of the original trial record, the Court would be pre-

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Montana Supreme Court correctly viewed all the evidence in a light most favorable to Sible rather than making a balanced independent review of the record on the issue of actual malice. Respondent's Brief at 9-10. There are two flaws in Sible's argument. First, the standard articulated in *Liberty Lobby* was in the context of summary judgment, not review of a jury verdict. This Court has clearly distinguished those contexts. *Liberty Lobby* stated: "At the summary judgment stage, the judge's function is not himself to weigh the evidence but to determine whether there is a genuine issue for trial." 91 L. Ed. 2d at 212. In contrast, the Court stated in *Bose Corp. v. Consumers Union of United States, Inc.*, that a court reviewing a jury verdict on the issue of actual malice is to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. 485, 514 (1984). The second flaw in Sible's argument is that if the Montana Supreme Court had applied the standard Sible advocates, it should have viewed the facts in the light most favorable to Lee Enterprises and Schwennesen, not Sible, since Sible was the losing party at trial and the moving party on appeal to the Montana Supreme Court.

mature in granting either summary reversal or certiorari. Schwennesen's notes have been made available in response to a request for production, and the Court may properly review them in making its determination of the finality of the Montana Supreme Court's decision. A transcript of those handwritten notes is being filed with this brief as an Appendix.[2] The Court can see for itself that there is nothing in the notes that could justify the burden and expense of yet another trial, and nothing that poses an obstacle to summary reversal. In any event, the Court repeatedly has found state court decisions ripe for review where they threaten First Amendment rights despite ongoing lower court proceedings. Even if summary reversal is not granted, well-established precedent justifies granting certiorari without awaiting further proceedings in the state courts.

ARGUMENT

I. SUMMARY REVERSAL IS APPROPRIATE IN THIS CASE.

Contrary to Sible's contention[3] and the Montana Supreme Court's decision, the jury was properly instructed on the issue of actual malice. Both Jury Instructions 12

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[2] On March 30, 1987, Sible propounded interrogatories, requesting information regarding Schwennesen's notes. Schwennesen agreed on May 1, 1987 to produce those notes in response to an appropriate request for production and protective order. Because Schwennesen kept notes chronologically and not separately for each story, the Appendix omits interspersed notes concerning other stories. The Appendix has been bound separately to insure that only the Court and the parties have access to the notes to protect possible privacy concerns of individuals named therein.

[3] Sible claims at page 12 of his brief that the jury instructions did not set forth "the definition of actual malice, which is simply publishing a known falsehood or recklessly disregarding the truth." This charge is patently false. Jury Instruction 11 stated that the plaintiff must prove that the article "was published with malice, that is, with knowledge that it was false, or with a reckless disregard of the truth." Appendix to Petition at 5a.

and 13 were taken virtually verbatim from *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See* Appendix to Petition at 5a-6a. Nevertheless, the Montana Supreme Court characterized those instructions as "fatally defective" without even mentioning *St. Amant*. *See id.* at 6a.

Amazingly, Sible claims those instructions confused the jury on the correct legal standard and were actually contrary to *St. Amant*. *See* Respondent's Brief at 14. The jury was fully instructed by Jury Instruction 13 that they need not believe the reporter's subjective statements but could find actual malice if the story was published "despite obvious reasons to doubt the veracity of the informant upon whom the article was based, or to doubt the accuracy of his reports." Appendix to Petition at 6a. Based on the evidence at trial, the jury determined there were no obvious reasons for Schwennesen to doubt the veracity of Salisbury's story.

It cannot be overstressed that the Montana Supreme Court conceded that, under the instructions given, the jury could have found "there was no actual malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement." Appendix to Petition at 7a. It is even more significant that the Montana Supreme Court came to that conclusion after viewing the evidence in a light most favorable to Sible. *Id.* at 2a.

A fortiori, had the Montana Supreme Court made a truly independent review as required by *Bose*[4] rather than its one-sided review in favor of Sible, and had it applied the proper legal standard under *St. Amant*, it would have upheld the jury's finding of no actual malice.

Sible argues that *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1977), *cert. denied*, 449 U.S. 1102 (1981), bolsters his contention that the jury instructions were erroneous in this case. *See* Respond-

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[4] *See supra* note 1.

ent's Brief at 14. To the contrary, the *Alioto* court quoted *St. Amant* for the very same actual malice standard rejected by the Montana Supreme Court. 519 F.2d at 779 ("The defendant must be proved to have subjectively 'entertained serious doubts about the truth of his publication.' ").

Sible also argues that the Colorado Supreme Court in *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315 (Colo. 1981), found actual malice on facts "akin to the facts of Sible's case." Respondent's Brief at n.6. This case and the Colorado case are, in fact, quite disparate. Specifically, the Colorado Court found actual malice only where (1) the reporter "admitted that he had *no basis* for most of his erroneous statements;" *and* (2) "he failed to take time to corroborate allegations made in the articles;" *and* (3) he failed "to pursue the most obvious sources of possible corroboration or refutation." *Kuhn*, 637 P.2d at 319 (emphasis added).[5] In addition, the *Kuhn* court was *upholding* a jury finding of actual malice.

By contrast, Schwennesen had multiple corroborating bases for his statements, including Sible's own admission that he had the allegedly stolen property in his possession, and Schwennesen did pursue multiple sources to verify the allegations made by Salisbury. After considering all the evidence, the jury in this case found no actual malice.

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[5] A later Colorado case distinguished *Kuhn* and found no actual malice where the evidence did not show that the reporter actually fabricated facts. *Manuel v. Fort Collins Newspapers, Inc.*, 661 P.2d 289, 291 (Colo. App. 1982). A subsequent Colorado Supreme Court case followed *Kuhn* in finding actual malice, but again only where the Court was *upholding* a jury finding and the reporter "testified that she had *no basis* for the use of the defamatory language . . . ." *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1362 (Colo. 1983) (emphasis added). It should be noted as well that the Colorado Supreme Court later cited *Kuhn* in approving a jury instruction almost identical to Jury Instruction 12 rejected by the Montana

The fact that Schwennesen's notes were not part of the original record should not prevent this Court from summarily reversing the Montana Supreme Court. Those notes have been produced in response to a discovery request and are available for the Court to review.[6] The Court will see for itself that nothing in those notes shows that Schwennesen entertained serious doubts as to the truth of the article. Since *Bose* requires a reviewing court to make an independent review of the evidence on actual malice, the Court can summarily reverse the Montana Supreme Court and avoid unnecessary relitigation of the case. Schwennesen's notes reveal that they do not warrant the burden and expense of a new trial.

II. IF SUMMARY REVERSAL IS NOT GRANTED, A WRIT OF CERTIORARI IS ESSENTIAL AND SHOULD BE GRANTED AT THIS TIME.

In order to review a decision of a state court, this Court must first determine that the decision is final. 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, the Court recognized four categories of cases that it will treat as final without awaiting completion of additional proceedings in state courts. 420 U.S. 469 (1975). In

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Supreme Court. *See Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1109 (Colo. 1982) (also citing *St. Amant*).

[6] As discussed in the following section of the brief, the Court must decide whether the Montana Supreme Court decision is final for purposes of review. In making that determination, the Court may examine "both the judgment and the opinion as well as other circumstances which may be pertinent . . . ." *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947). It is well settled that "other circumstances" include relevant matters both within and outside the original record. *E.g., Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946). Therefore, the Schwennesen notes, which were not part of the original trial record but which now have been produced, are reviewable by the Court.

describing the fourth category, the Court stated it would review cases

> where the federal issue has been fully decided in the state courts with further proceedings pending in which the party seeking the review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . . In these circumstances, if a refusal immediately to review the state decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state court for purposes of state litigation.

Id. at 482-83.

The Court has identified the First Amendment as one of the key federal policies it seeks to protect by asserting "category four" review. In *Cox Broadcasting*, the Court held that a Georgia Supreme Court decision was final despite ongoing lower court proceedings where the Georgia Supreme Court decision would have left the local press in an "uneasy and unsettled constitutional posture" harmful to the operation of a free press if the Court delayed its review. 420 U.S. at 485-86.

A similar unsettled constitutional posture will result if the Court delays review of the Montana Supreme Court's decision. That decision stands as a summary reversal of *St. Amant*, leaving the Montana courts, including the court on remand, with a Hobson's choice of whether to disregard the prior mandate of this Court or to disregard the clear order of the Montana Supreme Court. It also presents the Montana press with the same untenable dilemma and significantly restricts the operation of a free press.

In *Miami Herald Publishing Co. v. Tornillo*, the Court held that a Florida Supreme Court decision remanding a case for further proceedings under a state "right of reply" statute was final for purposes of review. 418 U.S. 241 (1974). The statute required the press to give equal space to any political candidates it criticized. The Court stated:

> Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the Florida statute] could only further harm the operation of a free press.

Id. at 246-47 & n.6.[7]

It is equally harmful to the operation of a free press in the State of Montana to leave unanswered the important First Amendment question raised by the Montana Supreme Court's rejection of the *St. Amant* standard of actual malice in this case.

CONCLUSION

This case is ripe for the Court's review. Clear precedent establishes that the Montana Supreme Court decision is final for purposes of review.

Nothing prevents the Court from summarily reversing the Montana Supreme Court. Even that court acknowledges that under the legal standard of actual malice articulated by this Court, the jury was justified in finding no actual malice. The reporter's notes have been

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[7] *See also NAACP v. Claiborne*, 458 U.S. 886, 907 n.2 (1982) (free speech); *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (free speech); *Nebraska Press Ass'n v. Stewart*, 423 U.S. 1327, 1328 (1975) (Blackmun, J., sitting as Circuit Justice) (free press).

made available in response to a discovery request and are properly reviewable by the Court. In making its independent review of the evidence, including those notes, the Court can determine for itself that there is no clear and convincing proof of actual malice. By summarily reversing the Montana Supreme Court, the Court will prevent unnecessary relitigation of this case under an erroneous legal standard imposed by the Montana Supreme Court.

Even if the Court does not grant summary reversal, the Montana Supreme Court's decision is final for purposes of granting certiorari. The Court has readily granted certiorari in similar cases in which a state court decision seriously infringed First Amendment rights.

Petitioners respectfully urge this Court to act immediately to relieve the Montana press and lower courts of the dilemma created by the Montana Supreme Court's summary reversal of the *St. Amant* rule.

Respectfully submitted,

P. CAMERON DEVORE *
MARSHALL J. NELSON
DONALD S. KUNZE
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

HAROLD V. DYE
MILODRAGOVICH, DALE & DYE, P.C.
P.O. Drawer R
Missoula, Montana 59806
(406) 728-1455

Attorneys for Petitioners

* Counsel of Record